

Docket No. RM2013-4

(July 29, 2013)

By Order No. 1739, issued June 5, 2013, the Commission called for comments on its “Notice of Proposed Rulemaking Establishing Rules Pursuant to 39 U.S.C. 404a,” which proposes, *inter alia*, to establish “accelerated procedures” for the filing of complaints alleging that the Postal Service has violated section 404a of the Postal Accountability and Enhancement Act by establishing regulations that have the effect of harming competition. Valassis Direct Mail, Inc. (Valassis) hereby submits its comments in response to the Commission’s order and notice.

The “accelerated procedures” in the Commission’s proposed Part 3033, available solely at the option of a complainant, achieve acceleration by eliminating discovery and hearings. The proceeding would be restricted to and decided upon “the basis of only a complaint and answer, and in limited circumstances, a reply” by the complainant. Order 1739 at 11. The answer to the complaint is due within a mere 20 days of the filing of the complaint, and the Commission would issue its final decision within 90 days of the complaint.

The Commission purports to model these accelerated procedures on what it calls “similarities” with regulations of the Federal Communications Commission, citing the FCC’s procedures for adjudicating “program access proceedings” in 47 CFR 76.1003.

But in fact, those FCC procedures specifically allow for discovery, as set forth in paragraph (j) of section 76.1003:

“(j) Discovery. In addition to the general pleading and discovery rules contained in § 76.7 of this part, parties to a program access complaint *may serve requests for discovery directly on opposing parties*, and file a copy of the request with the Commission.” [emphasis added]

The FCC rules further allow that issues relating to damages may be set for hearing before an Administrative Law Judge.

In addition to this inconsistency with the FCC procedures, the core problem with the Commission’s proposed rule is that it will likely severely impair the due process rights of the respondent Postal Service and other parties who oppose the complaint, denying them the opportunity through discovery and hearing to test the validity and probative value of the facts and allegations presented in the complaint. This problem is particularly acute in complaints alleging that the Postal Service has violated section 404a(1) through a rule or regulation that has the effect of precluding competition or establishing the terms of competition, thereby creating an unfair competitive advantage. Issues and arguments raised by a complainant in such a case – relating to the nature of the marketplace, the effect of the regulation on the marketplace, and the nature and degree of the purported unfair competitive advantage and harm to the complainant – will in most cases be complex, requiring a more thorough opportunity to test the underlying factual assertions and arguments.

Yet surprisingly, the Commission’s discussion of the due process implications of its proposal focus solely on the due process rights of the *complainant*, with no mention of the rights of parties opposing the complaint. The Commission notes, for example, that the absence of discovery will not impair the rights of *complainants* who have voluntarily

opted for the accelerated procedures, as they will have presumably concluded that discovery of the Postal Service is not necessary for them to establish their case, and moreover, that they will have plenty of time to amass evidence of “competitive harm in the marketplace” and harm to their business to support their claims. Order 1739 at 12-13. What the Commission overlooks is the potentially enormous unfair tactical advantage this highly-expedited, no-discovery process gives to such complainants. Opting for the accelerated procedures will not only speed their complaint but, *perhaps far more importantly*, immunize their factual allegations and arguments from discovery that might otherwise uncover serious errors or deficiencies that undermine their case. Opponents of the complaint will have neither the time (a mere 20 days) nor the ability (due to lack of discovery) to fairly assess and respond to the complaint.

The mere availability of discovery and the opportunity to confront the testimony of witnesses, *even if not exercised*, serves a salutary purpose. A complainant opting for the accelerated procedures, knowing that its allegations will be immune from discovery, may be tempted to play with the facts, painting a picture that better fits with its case. But if the parties know in advance that what they say may be subject to the scrutiny of discovery, they are likely to exercise greater diligence in preparing their case to ensure that their allegations will stand up to such scrutiny. And of course, discovery and the opportunity to confront witnesses also serves the Commission’s interest in developing a sound record as the foundation for reasoned decisionmaking.

In this regard, the Commission’s apparent dissatisfaction with the speed and efficiency of its current complaint procedures may be overstated. In the GameFly complaint (Docket No. C2009-1), the lone complaint proceeding involving issues related

to unfair competition, the length of the proceeding was primarily due to protracted settlement negotiations that resulted in an agreement which terminated the proceeding. Part of the problem, however, may be of the Commission's own doing. By allowing complaints to be litigated as though they were full-blown federal district court-style antitrust cases, the Commission may have inadvertently created an unnecessarily complex and unconstrained process that fosters delay. Most potential complaints can and should be managed more efficiently through a tighter rein on the proceedings that discourages excessive or overly burdensome discovery and motions practice and delaying tactics. That would far better serve the Commission's important oversight role than adopting this new sharply-curtailed procedure which would likely greatly impair both legitimate due process rights and the development of a sound record for decisionmaking.

Respectfully submitted,

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